D & C NOMURA MERCHANT BANKERS BHD.

v.

GUNUNG KUARI SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CIVIL SUIT NO. C23-537-86]
24 NOVEMBER 1989

BANKING : *Guarantee - Principal borrower requesting for restructuring of credit facility and deferment of repayment schedule - Guarantor opposing borrower's request - Whether restructuring of credit facility or deferment of repayment schedule discharges guarantor of liability - Whether guarantor is discharged from liability for the creditor's inaction against the principal borrower and other guarantors - Sections 92, 94 Contracts Act 1950 - Interpretation of relevant clause in the guarantee - Overriding of common law rights.*

CONTRACT: *Sections 92, 94 of Contracts Act - Guarantee.*

This was the plaintiff's appeal against the dismissal of an O. 14 application against the 4th defendant (guarantor). The plaintiff had granted credit facilities to the 1st defendant. The 2nd, 3rd and 4th defendants were guarantors. Owing to financial difficulties, the 1st defendant sought a restructuring of the facility and possibly a deferment of the repayment schedule. The 4th defendant opposed the request for restructuring of facility and deferment of repayment schedule and considered itself discharged from liability in the event the plaintiff accommodated the 1st defendant's request. The 4th defendant further contended that it was discharged from liability because of the plaintiff's failure to proceed against the 1st, 2nd and 3rd defendants and for failing to crystallize the debenture which created a fixed and floating charge of all the assets of the 1st defendant. The plaintiff relied, *inter alia*, on the certificate of indebtedness clause under the guarantee document.

Held:

[1] Under the guarantee document, the parties agreed that it is a continuing guarantee and that each guarantor is liable as principal debtor;

[2] The parties also agreed that the liability of the guarantors and each of them is not to be affected, *inter alia*, by any time indulgence waiver or consent given to the borrower or any guarantor, the enforcement or absence of enforcement of the security documents or any security or other guarantee or the release of such security guarantee;

[3] The parties also agreed that a certificate of indebtedness by an authorised officer of the plaintiff shall be bending and conclusive against the guarantors of the amount payable by the principal borrower and such certificate is indeed binding unless there is manifest error.

[4] The 4th defendant (guarantor) had bargained away its rights (enshrined in ss. 92 and 94 of the Contracts Act) to make complaints about indulgence of time being given by the plaintiff to the 1st defendant and the absence of enforcement of security documents or any security.

[Appeal allowed with costs. Leave granted to the plaintiff to enter final judgment against the 4th defendant.]

Cases referred to:
D & C Bank v. Almas Motor Corp. (M) Sdn. Bhd. & Ors. [1988] 3 MLJ 229
Heng Cheng Swee v. Bangkok Bank Ltd. [1976] 1 MLJ 267
Bank Bumiputra v. Kredin [1988] 1 CLJ (Rep) 365
Bank Bumiputra v. Doric Development Sdn. Bhd. [198] CLJ (Rep) 486
Ooi Boon Leong v. Citibank & Ors. [1984] 1 MLJ 222
Burnes v. Trade Credits Ltd. [1981] 2 All ER 122
National Bank of Greece SA v. Pinios Shipping Co. No. 1 [1989] 1 All ER 213

Legislation referred to:
Contracts Act 1950, ss. 92, 94
Rules of the High Court 1980, O. 14

For the plaintiff/respondent - Tan Swee Im; M/s. Shook Lin & Bok
For the 2nd defendant/appellant - R.D. Rajasingam; M/s. Lewis & Co.

JUDGMENT

VC George J:

Pursuant to a credit facilities agreement of 13 September 1982 and a settlement thereto dated 21 April 1983 the plaintiff provided the 1st defendant with a term loan and a revolving credit facility. There were agreed terms of repayment which included the payment of interest on the amounts advanced to the 1st defendant.

The 2nd, 3rd and 4th defendants by a letter of guarantee dated 13 September 1982 and a supplement thereto dated 21 April 1983 guaranteed the repayment of all amounts payable by the 1st defendant. The 4th defendant's liability was however restricted to 50% of the amount repayable by the 1st defendant.

Pursuant to the agreements various advances were made on both the term and the revolving credit facility to the 1st defendant. The 1st defendant ran into difficulties. By letter dated 12 August 1984 the 1st defendant informed the plaintiff of their problems and ended the letter with an indication that the 1st defendant would be seeking a restructuring of the facility which it was said would possibly involve a deferment of the repayment schedule.

The 4th defendant wrote its letter of 13 September 1984 to the plaintiff referring to the 1st defendant's said letter and pointing out that they had previously advised the plaintiff of the deterioration of the financial circumstances and that they were opposed to any restructuring of the facility or deferment of the repayment schedule. They ended the letter by giving notice that the 4th defendant would consider themselves discharged from their position as guarantors should the plaintiff restructure the facility or defer the repayment schedule.

By another letter dated 23 October 1985 the 4th defendant complained of the alleged inertia on the part of the plaintiff *vis-a-vis* the 1st defendant and alleged that the plaintiff had agreed with the 1st defendant and the 2nd and 3rd defendants not to take any action against any of them. The 4th defendant ended the letter stating that it considered itself discharged from its liabilities as a guarantor.

The writ herein was caused to be issued against the borrower and all the guarantors on 6 March 1986. Judgment as prayed was obtained against the 1st, 2nd and 3rd defendants. The proceedings against the 4th defendant was delayed as apparently there were difficulties in effecting service of the writ on the 4th defendant particularly as the 4th defendant was outside the jurisdiction.

The plaintiffs sought O. 14 proceeding against the 4th defendant and failed. They now appeal against the Senior Assistant Registrar's decision in this Court.

Now, apparently there was a debenture creating a fixed and a floating charge of all the assets of the 1st defendant. For the 4th defendant it is contended that upon the 4th defendant as a guarantor calling upon the plaintiff bank to proceed against the borrowers and the banks failing to do so either by foreclosure or by crystallising the debenture and appointing a receiver and or a receiver and manager the 4th defendant had been discharged of its liability. It is contended that in any event that contention provides a triable issue. It is also contended that because the plaintiff had restructured the facility and had deferred the repayment schedule the 4th defendant was discharged. In any event, whether it was so discharged is, it is contended, another triable issue. For the 4th defendant ss. 92 and 94 of the Contracts Act were relied on and as authority *inter alia* my judgment given in *D & C Bank v. Almas Motor Corp. (M) Sdn. Bhd. & Ors.* [1988] 3 MLJ 229 was cited.

In that case, for the plaintiff it had been argued that cl. 17 of the guarantee did away with the effect of ss. 92 and 94. Clause 17 there was as follows:

> The bank shall be under no liability to marshall in our favour any securities or any of the funds or assets which the bank may be entitled to receive or upon which the bank has a claim.

That clause only dealt with priorities of proceedings to be affected and did not dispose of or even deal with the right of the guarantor to effectively complain about the inertia of the bank. Leave to defend was granted in that case.

In the instant case for the plaintiff various clauses of the guarantee document were invoked and submitted as having the effect of the guarantors including the 4th defendant having bargained away all its rights provided by ss. 92 and 94. That the parties are bound by the terms of their contract is trite - see *Heng Cheng Swee v. Bangkok Bank Ltd.* [1976] 1 MLJ 267 at 274; also see *Bank Bumiputra v. Kredin* [1988] 1 CLJ (Rep) 365.

The clauses relied on are as follows:

> Article II s. 2.01 by which the parties agree that it is a continuing guarantee and that each guarantor is liable as principal debtor and further that the liability of the guarantors and each of them is not to be affected *inter alia* by any time indulgence waiver or consent given to the borrower or any guarantor, the enforcement or absence of enforcement of the security documents or any security or other guarantee or the release of such security guarantee.

By s. 2.02 it was agreed that the guarantors' respective obligations will remain in full force and effect until no sum remains to be lent or remains payable and an absolute discharge or release of the guarantors has been signed by the plaintiff.

Section 4.01 provides that the guarantee will be in addition to other security and by s. 7.04 it was agreed that a certificate of indebtedness by an authorised officer of the plaintiff shall be binding and conclusive against the guarantors of the amount payable by the 1st defendant.

In the instant case there is such a certificate of indebtedness under the hand of an authorised officer of the plaintiff bank.

The judgment of Shankar J in *MIMB v. G & C Securities* KL HCCS 23-1657-86 unreported and the judgment in *Bank Bumiputra v. Doric Development Sdn. Bhd.* [1987] CLJ (Rep) 486 provided authority for the proposition that such a certificate is indeed binding unless there is manifest error.

No attempt was made to show that there was any error on the statement of accounts or in the certificate of indebtedness. The amount that was to be advanced by way of term loan and revolving credit was to be a total of RM6 million. Apart from the certificate of indebtedness there are the 4th defendant's own letters which appear to admit that RM6 million was advanced and that the 4th defendant is liable in respect of RM3 million of that amount - see encl. (50) Exhibits RIA2 and RIA3.

The rest of the complaints on which the 4th defendant seeks to have issues tried are in effect in respect of indulgence and time being given by the plaintiff to the 1st defendant and the absence of enforcement of security documents or any security i.e., crystallising of the debenture and appointing a receiver or a receiver and manager.

In my judgment, on the face of the provisions in Art. II s. 2.01 the 4th defendant had bargained away its right to make such complaints. Section 2.02 makes it clear that until all amounts payable by the 1st defendant have been paid the guarantors' obligations remain. In the face of these terms of the guarantee agreement whereby the 4th defendant had allowed itself to be tied down in what appears to be a water-tight agreement the 4th defendant's sense of outrage is misconceived.

It seems to me, reading the terms of the guarantee, that the misgivings the 4th defendant had after the RM6 million had been disbursed was in fact anticipated by the plaintiff lender. It was not prepared to lend the money until it was assured that the experts from Australia were prepared to back the venture with their guarantee to the extent that they were prepared to execute what appears to be an unusually tight and somewhat one-sided letter of guarantee.

The old authorities from the English reports cited were of no help in the face of the provisions of this guarantee by which the 4th defendant had bargained away those common law rights (now enshrined in ss. 92 and 94 of our Contracts Act). At one stage it was thought that such statutory rights could not be bargained away but that was put to rest by the Privy Council in *Ooi Boon Leong v. Citibank & Ors.* [1984] 1 MLJ 222.

There were complaints of delay in filing proceedings, that nothing was done to execute judgment obtained against the other guarantor and against the 1st defendant.

But all that is taken care of by Art. II s. 2.01(3)(v) and (vii) the terms of which make such complaints untenable.

In the face of those provisions in the guarantee the right of the 4th defendant as a surety to dictate terms (if sureties have such a right) were bargained away. The plaintiff is not even obliged to give reasons for delay, indulgence, consent and so on. Accordingly *Burnas v. Trade Credits Ltd.* [1981] 2 All ER 122 has no application here.

As to the complaint that the bank continued to allow the account of the 1st defendant to be operated see *National Bank of Greece SA v. Pinios Shipping Co.* No. 1 [1989] 1 All ER 213 - the allowing of payments-in to reduce the mortgage was in fact approved by that case - see pp. 229 and 230.

There was an attempt to show that advances were made after notice had been given by the 4th defendant that they wanted to be discharged. However it seems to me clear that fresh advances had not been made - what was given was the extension of the period of the revolving credit which in effect amounted to the granting of further indulgence and time to the 1st defendant. No new money was injected into the account - all that happened was that the old loan amounts advanced were not called in. Section 2.01 allows that and that section prevents the 4th defendant from complaining about it.

I find no *bona fide* triable issue. The appeal is allowed with costs.

There will be leave to the plaintiff to enter final judgment against the 4th defendant as prayed in the statement of claim but as adjusted and certified in the affidavit of Edwin Gomez encl. (58) in the Court file.

Also found at [1990] 2 CLJ 58